

Europe's Rule of Law Dialogues: Process With No End in Sight

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Europe's dialogues on the rule of law seem to be going really well lately. Since the Article 7 TEU procedures were launched in earnest against Poland and then Hungary, the feisty national governments appear to heed to the strong hints of European constitutional actors. So much so that one may be inclined to believe in the power of conversation about fundamentals: despite their very special political ways, these unruly national governments may be ready to return to the fold.

After all, on November 21, 2018 the Polish government [decided to retreat](#) on forcing the judges of the Supreme Court into early retirement. The announcement followed the hearing before the CJEU in the infringement case (C-619/18 R *Commission v. Poland*), fast-tracked upon the Commission's [successful request for an interim injunction](#) in October 2018. On November 6, 2018 the Hungarian Constitutional Court [invalidated](#) the regime of disability assistance as a violation of international human rights obligations, echoing earlier judgments of the European Court of Human Rights. Not bad for a constitutional court working with a majority of FIDESz appointees.

Is this the kind of news guardians of the rule of law hope for in troubled times? On closer inspection: not exactly.

On the surface the Polish Government's decision to give up on the early retirement of Supreme Court judges sounds like a major victory for the Commission. The amendment was introduced in the summer of 2018, almost as a random afterthought, to complement a complex and [much-criticized](#) judicial reform package. At the time the Article 7 TEU process was already before the Council, in a somewhat dormant state, so the Commission tackled the amendment in a separate infringement action. The Commission moved not long after the Supreme Court itself turned to the CJEU with [a courageous, though most unusual preliminary ruling request on its own fate](#).

Right after the CJEU hearing in November 2018 the Polish Ministry of Foreign Affairs issued a [statement](#) confirming the Government's support for the measure and insisting that "the Commission incorrectly weighed up the interests of the parties by failing to allow for the need to ensure the uninterrupted functioning of the Supreme Court, independence of its Judges, and legal certainty of the parties to proceedings before this Court." This sounded more like much ado for nothing, as soon as the interim injunction landed in October 2018, the initially defiant tone of the authorities was muted by Zbigniew Ziobro, the Minister of Justice [saying](#) that Poland was going to give effect to the injunction.

The Polish government's retreat is hardly an unexpected response to European constitutional actors in the course of a dialogue about the rule of law. Instead, every step of this charade is part of a calculated political strategy to handle the European dialogue. On October 21, 2018 PiS was going into local elections with an electorate, an estimated 70 per cent of which supports EU membership. When Adam Bielan, the deputy speaker of the Senate (and a senior Kaczyński aide) [hinted at](#) another round of judicial reforms in the making, he did not miss the opportunity to note that the timing of the case leaves one with the impression that certain high European constitutional actors were seeking to interfere with the recent local elections.

The more recent retreat on the Supreme Court reform is also curiously timed. Just days before, on November 10, 2018 on the 100th anniversary of Polish independence, in a speech in Lodz [Donald Tusk denounced](#) the current Polish governing elite as "contemporary Bolsheviks" who threaten the nation's independence, but can be defeated. Mr Tusk is not only a holder of a high EU office and a former Polish Prime Minister, but is also rumored to be in the race for the Polish presidency in 2020.

That the Polish government is keen to address the concerns (or at least the sentiments) of its electorate is certainly good news for supporters of constitutional democracy in Poland. The fact, however, remains that when the Polish government responds favorably to the rule of law concerns of European constitutional actors, it does so for reasons that have little to do with the virtues of the European rule of law dialogue itself. This should be reason for serious concern for the chaperones of the rule of law in Europe.

The [Commission's proposal](#) to tie certain EU funds to rule of law performance ahead of the adoption of the next MFF for 2021-27 is clearly inspired by the behavior of the usual suspects. Despite being under constant criticism about its rule of law performance, the Hungarian government has been a trusted recipient of EU funds. As the Commission's proposal is on the table – even if it [is contested by the Council's Legal Service](#) – even the Hungarian government found it best to pay a nod to at least some international obligations: the judgment of the Constitutional Court does exactly that, and not much more.

Let's not forget: the Hungarian government has been a loud opponent of the European Public Prosecutor's Office, invoking its national sovereignty to fend off European intrusion at every step of the process, starting from the [parliamentary scrutiny](#) phase back in 2014. With the moderate success of European actors (OLAF and co.) to tackle the misuse of EU funds in Hungary, the issue is kept alive by the opposition MPs and [civil society organizations](#). This appears to be a pretty lonely fight: the infringement action concerning the law demonizing NGOs receiving foreign funding has been [pending before the CJEU](#) since December 2017. While we wait, at least do as much for the rule of law that we do not start to wonder about starting a conversation about protecting constitutional identity in Europe.

Instead, let's reflect on the consequences of rule of law compliance taking a dialogic format in the EU. It is true that after the hearing before the CJEU the Polish government may have taken back its proposal to send Supreme Court justices into

early retirement. One may also assume that the Polish government was well-aware that the measure is a blatant violation of EU law: this is [exactly what the CJEU found](#) about a similar Hungarian measure in 2012. Thus, when the Polish government added the early retirement requirement of Supreme Court judges to its judicial reform package – seemingly as an afterthought – it was essentially making a move it knew it was going to have to retract at one point. And it did so at a time when it served its interests best: the Commission can now claim that the rule of law dialogue works after all, while Poland gets to keep the rest of its [highly problematic judicial reform](#) in place without having to compromise on the features that turn the judiciary into a Soviet style apparatus (to paraphrase the [Venice Commission](#)).

This stylized, dialogue-based approach to defending the rule of law in its current form appears to serve strategic violators of the rule of law – like the current Polish and Hungarian governments – better than its defenders.

The cause for concern is not that violators of the rule of law are strategic political actors or that they are disingenuous. Rather, the real problem is the unspoken premise on the basis of which defenders of the rule of law are more and more inclined to accept these developments as the very features of the EU's rule of law safeguards. This acceptance is based on the flawed premise that so long as a procedure is in place one cannot really do more to defend the rule of law.

Formalized processes themselves do not yield results: procedural rules structure interactions, set the pace of exchanges, screen out certain proposals and allow for the correction of mistakes. Yet, after all the pacing, combing and retouching the outcome will not be produced by the process itself: it takes the actors to pursue a process to a particular end (like safeguarding the rule of law). For the time being European constitutional actors seem to be more interested in having a dialogue about the rule of law with offending member states and with each other than with taking action to actually defend it. This may be a sensible strategy in external relations, it is certainly a [curious approach](#) under the Cooperation and Verification Mechanism (CVM) and is simply self-defeating at a time when the very same European actors admittedly sense that the founding values of the Union are at “a clear risk of a serious breach” in certain member states.

